

**FILED BY CLERK**

**APR -8 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JOHN JOY, JR.,	)	
	)	
Plaintiff/Appellant,	)	2 CA-CV 2009-0097
	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JIMMY and CASSIE JOY,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Defendants/Appellees.	)	
_____	)	
	)	
JIMMY and CASSIE JOY,	)	
	)	
Plaintiffs/Counterdefendants/	)	
Appellees,	)	
	)	
v.	)	
	)	
JOHN JOY, JR.,	)	
	)	
Defendant/Counterclaimant/	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause Nos. CV2008-022 and CV2008-029 (Consolidated)

Honorable Monica L. Stauffer, Judge

VACATED AND REMANDED

Law Offices of Todd A. Schultz  
By Todd A. Schultz

Phoenix  
Attorney for Appellant

B R A M M E R, Judge.

¶1 John Joy appeals from the trial court's orders finding enforceable a purported settlement agreement between him and appellees—his son, Jimmy Joy, and Jimmy's wife, Cassie—and fixing the location of a fence on the real property subject to that agreement. He also appeals from the court's award of attorney fees in favor of the appellees. We vacate the court's orders and its award of attorney fees and remand the case to the trial court.

### **Factual and Procedural Background**

¶2 On May 7, 2008, John filed an action for unlawful detainer against Jimmy and Cassie. Jimmy and Cassie filed a separate action against John to quiet title and for wrongful ejectment. The cases were consolidated. The parties engaged in a court-ordered settlement conference on September 25, 2008, at which they apparently reached an agreement. That part of the conference in which the settlement judge summarized the details of the agreement was transcribed, and the settlement judge issued a minute entry summarizing the transcribed portion. The parties do not dispute that Jimmy and Cassie prepared a written settlement agreement, which John refused to sign.<sup>1</sup>

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<sup>1</sup>This written settlement agreement does not appear in the record.

¶3 Jimmy and Cassie filed a motion for an order to show cause to enforce the terms of the settlement agreement. At the hearing on the motion, their counsel referred to a version of the written settlement agreement that they had drafted and that John had refused to sign. The trial court heard testimony that the version counsel had referred to did not reflect accurately the agreement the parties had reached at the settlement conference.

¶4 In concluding the hearing, the trial court stated it would “sign the order that states specifically what the agreement was” and ordered “the written document that . . . encompasses the agreement be submitted to the Court.” It appears that Jimmy and Cassie then mistakenly filed with the court a draft of the written settlement agreement that did not represent the parties’ agreement.<sup>2</sup> They subsequently submitted a different version from which a sentence purportedly had been removed pursuant to a “stipulation” into which the parties had entered.

¶5 On January 21, 2009, the trial court signed an order “recognizing the enforceability of all terms of the attached Settlement Agreement.” The court did not attach to the order the draft submitted by Jimmy and Cassie reflecting the purported stipulation but, instead, attached a different version of the written settlement agreement. The court awarded Jimmy and Cassie their attorney fees and further ordered the parties to consult with each other regarding where on the property a fence discussed in the settlement agreement ought to be constructed, despite that all versions of the settlement

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<sup>2</sup>This version also does not appear in the record.

agreement in the record purported to resolve that issue.<sup>3</sup> The court also ordered that, if the parties were unable to reach an agreement, they were to resubmit the fencing issue “for a judicial determination of the location of the fence.” The court previously had ordered the parties to provide a proposed survey or drawing to the court before constructing the fence.

¶6 The parties ultimately were unable to reach agreement on the location of the fence. The trial court ordered a hearing on the issue, and Jimmy and Cassie submitted a proposed fence line, as did John. The court ordered that Jimmy’s and Cassie’s proposal “be held firm” and permitted construction of the fence in accordance with their proposal. This appeal followed.

## **Discussion**

### **Jurisdiction**

¶7 We first address Jimmy’s and Cassie’s argument that John “waived his right to appeal issues other than the placement of the fence” because he did not file his notice of appeal timely from the trial court’s January 21, 2009, order. Jimmy and Cassie assert that order was a final, appealable judgment and John’s notice of appeal filed July 10, 2009, therefore was untimely. *See* Ariz. R. Civ. App. P. 9(a) (appeal must be filed “not later than 30 days after the entry of the judgment from which the appeal is

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<sup>3</sup>These versions included the transcribed settlement conference, the settlement judge’s minute entry summarizing that transcription, the revised draft submitted by Jimmy and Cassie, and the draft deemed binding by the court.

taken”); *see also James v. State*, 215 Ariz. 182, ¶ 11, 158 P.3d 905, 908 (App. 2007) (Rule 9(a) time limit jurisdictional).

¶8 To be appealable, an order must be a final judgment, meaning it “‘decides and disposes of the cause on its merits, leaving no question open for judicial determination.’” *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 14, 211 P.3d 16, 24 (App. 2009), *quoting Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977); *see* A.R.S. § 12-2101(B). The trial court’s January 21 order “recognized the enforceability” of the settlement agreement and ordered the parties to comply with its terms. It left open, however, the question of the location of the fence, ordering the parties to file a “written request with the Court, together with relevant survey(s) and/or map(s), for a judicial determination” of that issue should the parties fail to reach an agreement.

¶9 Jimmy and Cassie contend the trial court’s “invitation” to “request court intervention” “could not extend the time to appeal the January 21, 2009 order.” But this argument assumes the January 21 order was a final, appealable order, when it was not. In a signed minute entry following the hearing on Jimmy’s and Cassie’s motion for an order to show cause, the court directed the parties to provide it “a proposed survey or drawing” showing “where the actual fence will be placed” “prior to any construction of the fence.” Nothing in the court’s later order on January 21 modified or rescinded that instruction. Read together, these two orders plainly evidence the court’s intent to retain jurisdiction over the case to address the questions its January 21 order left unresolved. *See Green*,

221 Ariz. 138, ¶ 14, 211 P.3d at 24. Thus, John’s timely notice of appeal of the court’s order of July 1, 2009, fixing the location of the fence was sufficient to preserve any issues related to the January order. *See Rourk v. State*, 170 Ariz. 6, 13, 821 P.2d 273, 280 (App. 1991) (“There is no requirement that the notice [of appeal] designate intermediate orders which are to be raised as issues on appeal.”).

### Settlement Agreement

¶10 The trial court attached to its January 21 order, and deemed binding, a contract different than the revised version Jimmy and Cassie had submitted. The revised contract Jimmy and Cassie submitted provided in relevant part as follows:

Jimmy will grant a 15-foot easement for the ditch and the east side of the ditch from the fish hatchery to the ponds on the west side of the pasture for ingress, egress and maintenance.

In contrast, the contract deemed binding by the court provided:

Jimmy will grant a 15 foot easement along the ditch from the fish hatchery to the ponds on the west side of the pasture.  
Jimmy will also fence in the area of the lower ponds.

¶11 First, when it deemed the wrong contract binding, the trial court clearly abused its discretion. *See City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985) (court abuses discretion if actions are “clearly untenable, legally incorrect, or amount to a denial of justice”), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). Additionally, we observe that both the agreement the court deemed binding and the draft filed by Jimmy and Cassie differ substantively from the explicit terms to which they had agreed at the settlement conference. Those terms are

reflected in the transcript of the settlement conference as well as in the settlement judge's subsequent minute entry summarizing that transcript.

¶12 For example, the transcript of the settlement conference shows the parties agreed that “[a] fence will be erected by Jimmy along the line that we described as closing in the fishery runs, fishery buildings . . . or hatchery, . . . and pond at that end of the pasture” and that Jimmy and Cassie would grant John an easement “for the ditch and the water to run from his life estate property at the hatchery down to the ponds at the other end of the pasture.” Unlike the proposed settlement agreements discussed above, however, the transcript of and minute entry summarizing the settlement conference do not define the dimensions of the easement nor provide that it is for, or limited to, ingress, egress, and maintenance.

¶13 Thus, neither the contract Jimmy and Cassie submitted nor the one deemed binding by the trial court reflects the explicit terms of the settlement agreement reached at the settlement conference. *Cf. Geyler*, 144 Ariz. at 328-29, 697 P.2d at 1078-79; *Am. Nat. Fire Ins. Co. v. Esquire Labs of Ariz., Inc.*, 143 Ariz. 512, 526, 694 P.2d 800, 814 (App. 1984) (finding minute entry recital incorrect when inconsistent with transcript). Whether the parties had reached a mutual understanding at the conference regarding additional terms not transcribed, such as the dimensions or purposes of the easement, was not litigated. We therefore must vacate the trial court's January 21 order declaring the contract attached to that order binding. We additionally vacate the court's award of attorney fees, as well as its order fixing the location of the fence.

¶14 Our disposition of this appeal leaves open the question whether the settlement agreement, as described in the transcript, is an enforceable contract. That question appears to have been neither litigated in, nor resolved by, the trial court. Instead, the court erroneously found binding a contract containing terms absent from the settlement conference transcript and minute entry. We observe that, “before a binding contract is formed,” the parties must mutually assent “to all material terms.” *Hill-Shafer P’ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990). “A distinct intent common to both parties must exist without doubt or difference, and until all understand alike there can be no assent.” *Id.* ““Even though the parties manifest mutual assent to the same words of agreement, there may be no contract because of material difference of understanding as to the terms of the exchange.”” *Id.* at 474, 799 P.2d at 815, *quoting* Restatement (Second) of Contracts § 20 cmt. c (1981). Such mutual assent “is based on objective evidence, not on the hidden intent of the parties.” *Id.* Moreover, any ambiguity in a contract’s terms may be resolved by examining extrinsic evidence of the parties’ intent. *See Johnson v. Earnhardt’s Gilbert Dodge, Inc.*, 212 Ariz. 381, ¶ 12, 132 P.3d 825, 828 (2006).

### **Disposition**

¶15 For the reasons stated, we vacate the trial court’s order of January 21, 2009, deeming enforceable the contract attached to that order. We additionally vacate the court’s award of attorney fees in favor of Jimmy and Cassie and its order fixing the location of the fence. We remand the case to the trial court for proceedings consistent



with this decision. In our discretion, we deny John's request for attorney fees on appeal.

*See* A.R.S. § 12-341.01.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge